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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

NATHAN ERICK BUSSEY,

Defendant and Appellant.

C079797

(Super. Ct. No. 62-135055)

A jury found defendant Nathan Erick Bussey guilty of unauthorized taking or driving of a vehicle and receiving a stolen vehicle. Before trial, defendant had entered pleas of no contest to two misdemeanor counts of possession of drug paraphernalia and driving with a suspended license. Defendant admitted certain recidivist allegations, and the trial court sustained the remainder. It then sentenced him to state prison for six years (after striking findings of two prior prison terms).

On appeal, defendant argues the trial court improperly ignored his pretrial request to act in propria persona. He also contends that he received an unauthorized sentence because his two felony convictions should have been designated misdemeanors and he should have been sentenced accordingly, claiming the statutes on which these convictions are based should be *deemed* to be included within the reach of a 2014 proposition that reduced a number of offenses to misdemeanors, even though they are not expressly included. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The facts underlying the convictions are for the most part not pertinent to this appeal. The vehicle at issue in the two felony counts is a 1996 Pontiac Grand Am, the owner of which had given only his mother permission to use it. The car disappeared in December 2014 while in her possession without her permission. Defendant was found in possession of the car a week later, claiming to have received it from a third party. The arresting officer never assigned a specific value to the car, but agreed with an assessment of it on a California Highway Patrol (CHP) form that it was low in value, within a range of \$301 to \$4,000.¹ We will include facts pertinent to defendant's mention of self-representation in the Discussion.

¹ In seeking a misdemeanor charge at the preliminary hearing, defense counsel argued the car was probably worth less than \$950. In another pretrial proceeding, defense counsel had also asserted the value of the Grand Am was extremely low, "potentially being under \$950.00." In both instances, the prosecution did not focus on this point in its opposition.

DISCUSSION

1.0 Defendant Did Not Make an Unequivocal Request Before Trial to Represent Himself, and Thereafter Abandoned the Issue

1.1 *Background*

In an unusual move, defense counsel urged the trial court (Judge Colleen Nichols) to exercise its discretion to strike a recidivist allegation under Penal Code section 1385.² The court declined to exercise its discretion without prejudice to reconsideration after trial.

After setting a trial date, defense counsel reported to the court that defendant “has a request regarding access to the law library. It’s not something I’m familiar with at all. [¶] He would like to get to the law library in jail. He tells me, unless he has a Court order, he can’t go there.” The trial court responded that only self-represented defendants had made a request for such an order. The court’s bailiff indicated that the jail gave only self-represented defendants access. The trial court responded, “Remember, I don’t run the jail. So if he doesn’t represent himself, [I would be] ordering the Sheriff to have [defendant] run their jail.” Defendant then volunteered, “Your Honor, *I’m thinking about going pro. per. on this case*”; the court responded, “That would always be a bad idea, Mr. Bussey. *But if that time comes, then you can make that request.*” (Italics added.) When defendant disagreed (“because of the fact th[ere] were the mitigating circumstances”), the court asserted defense counsel was not derelict in failing to obtain the extraordinary remedy of a pretrial order striking a recidivist finding, and “to suggest what you [(defendant)] were starting to suggest is just offensive,” before then adjourning until the following week.

² Undesignated statutory references are to the Penal Code.

Following this March 2015 hearing, defendant appeared for two subsequent trial conference hearings before Judge Nichols, then one before Judge Jeffrey Penney, after which Judge Mark Curry took charge of the case in May 2015 for trial. Defendant never renewed the issue of self-representation before any of these judges.

1.2 *Analysis*

The right to represent one's self at trial is forfeited unless asserted in a timely and *unequivocal* manner, with a knowing and voluntary relinquishment of the right to the assistance of counsel. (*People v. Marshall* (1997) 15 Cal.4th 1, 20-21.) In the absence of an unequivocal statement of the intent to proceed without counsel, the trial court does not have the obligation to draw out the exact nature of defendant's intentions. (*People v. Skaggs* (1996) 44 Cal.App.4th 1, 7.) A court should draw every inference *against* the waiver of the right to assistance of counsel. (*Marshall*, at p. 23.) Even an unequivocal request is properly denied if it results from a fit of pique. (*Ibid.*) Finally, where a trial court *does not rule* on a request for self-representation, a defendant forfeits the issue on appeal if he does not subsequently obtain a ruling; a defendant is not allowed to save this issue as an "ace to play triumphantly on appeal." (*People v. Kenner* (1990) 223 Cal.App.3d 56, 62; accord, *Skaggs, supra*, at pp. 7-8.)

Defendant's attempt to premise reversible error on his brief exchange with Judge Nichols is many-flawed. His remark reflected only a *possible* course of *future* action, not a *present* intent to make a *definitive* decision. Furthermore, Judge Nichols *never ruled* on the issue, and simply said she would consider it *when* he made his decision. Therefore, defendant's failure to renew the issue subsequently constituted an abandonment of it. Finally, if (as Judge Nichols interpreted) the trial court's refusal to exercise discretion under section 1385 triggered the subject, it would not be a proper basis for seeking self-representation.

Defendant suggests his intent to represent himself did not arise as a result of the hearing, but was a possible basis of his desire to use the jail's law library. Even if this was the case, he never returned to the issues of self-representation and access to the law library after further reflection. He makes a bare assertion that Judge Nichols cut him off, and made him apprehensive about renewing the issue because she called it offensive to criticize counsel's efforts *at the hearing*. But in the absence of a stated *present* intention to proceed without counsel, a defendant is not entitled to further colloquy with the court regarding his or her intentions. This also does not reasonably explain why defendant should have had any persisting apprehension about explaining to either of *two other* judges of the court that his desire did *not* arise from defense counsel's performance at the hearing. (If defendant refrained from renewing the subject on the basis of the remark that self-representation is always a bad idea, then this was simply a truthful evaluation about self-representation and could not be the basis of any finding of error.) We therefore reject defendant's argument.

2.0 Neither Unauthorized Taking/Driving of a Vehicle nor Receiving a Stolen Vehicle Are Subject to Misdemeanor Treatment

In November 2014, the electorate enacted Proposition 47, which redesignated a number of offenses as misdemeanors, and provided a procedure in section 1170.18 for retrospective comparable relief for defendants who were serving or had completed a sentence for a previous conviction that would have been a misdemeanor “had this act been in effect at the time of the offense.” (§ 1170.18, subs. (a), (f); *People v. Johnston* (2016) 247 Cal.App.4th 252, 256, review granted July 13, 2016, S235041 [cited for persuasive value pursuant to Cal. Rules of Court, rule 8.1115(e)(1)] (*Johnston*).)

Johnston stated this proposition “prospectively reduced three specific drug possession offenses to misdemeanors (Health & Saf. Code, §§ 11350, 11357, 11377), as well as forging or writing bad checks (Pen. Code, §§ 473, 476a), receiving stolen

property (§ 496), and petty theft. It accomplished the latter with the addition of section 490.2, which now defines ‘petty theft’ as involving ‘money, labor, real or personal property’ with a value less than \$950 ‘[n]otwithstanding Section 487’ (§ 490.2, subd. (a)) (which had specifically defined ‘[g]rand theft’ on the basis of value or *type* of property) (§ 487)) ‘or any *other* provision of law *defining grand theft*’ (§ 490.2, subd. (a), italics added). The initiative additionally amended section 666 (also called ‘petty theft with a prior’) to allow wobbler punishment for recidivists who are otherwise disqualified from the reach of the initiative. Finally, it added the new misdemeanor of ‘shoplifting’ (§ 459.5). (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014) Official Title and Summary of Prop. 47, p. 34 (2014 Voter Guide); see also *id.*, text of Prop. 47, §§ 5-13, pp. 71-73.)” (*Johnston, supra*, 247 Cal.App.4th at pp. 255-256.)

Neither section 496d nor Vehicle Code section 10851 is included among the statutes that Proposition 47 amended. The trial court accordingly reminded defense counsel more than once during these proceedings that the proposition did not have any effect on these counts, a point that counsel conceded at sentencing (while remarking “it’s really, really, really close” to the types of offenses covered, and the voters “had exactly Mr. Bussey in mind”). In arguments that have been raised repeatedly in other cases in the context of retrospective relief,³ defendant asserts we should include these two statutes in the ambit of Proposition 47.⁴ We disagree.

³ Although a different procedural context, we would not find a rational legislative intent to provide prospective relief that differed from retrospective relief.

⁴ We will assume defendant’s arguments in the trial court and the testimony of the arresting officer are sufficient to satisfy his burden of production of evidence of the value of the car being less than \$950. (*Johnston, supra*, 247 Cal.App.4th at p. 258; *People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880.)

2.1 ***Vehicle Code Section 10851: Unauthorized Taking/Driving of a Vehicle***

Defendant contends we should construe the catchall provision of section 490.2 as referring to unauthorized taking/driving. He alludes to the general intent of the voters, and the fact that the offense is often referred to as vehicle theft (including in section 666 as amended). He also asserts excluding unauthorized taking/driving would create a sentencing anomaly because it would punish a lesser included offense more severely than a greater offense—grand theft auto (§ 487)—for vehicles worth less than \$950. Finally, he invokes the argument of last resort: a violation of equal protection.

In the face of unambiguous statutory language, it is not proper to rely on inchoate legislative purposes even where called to give liberal construction⁵ to an enactment. (*Johnston, supra*, 247 Cal.App.4th at pp. 256-257.) “The essence of lawmaking is the choice of deciding to what extent a particular objective outweighs any competing values, and a court in the guise of interpretation should not upset this balance where it is spelled out in the text of a statute.” (*Id.* at p. 257.) Thus, the inclusion of certain offenses in the enactment and not other similar offenses yields a strong inference of legislative intent to exclude the latter, particularly in the complete absence of any evidence of contrary intent in the voter materials regarding unauthorized taking/driving. (*Id.* at pp. 257-258; accord, *People v. Acosta* (2015) 242 Cal.App.4th 521, 526 [for same reason, attempted vehicular burglary not subject to misdemeanor treatment] (*Acosta*).)

Defendant’s arguments with respect to section 490.2 ignore the full language of the statute, which brings unspecified statutes “defining grand theft” within its reach.⁶

⁵ Defendant also adverts in passing to the rule of lenity. The principle is inapplicable in the present circumstances. It is limited to situations in which intrinsic or extrinsic indicia of legislative intent stand in equipoise. (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1315.) We do not have *any* indicia in defendant’s favor.

⁶ For purposes of retrospective relief, section 459.5 works in the same manner, in that it redefines certain conduct prospectively as misdemeanor shoplifting “[n]otwithstanding

The statute defining unauthorized taking/driving does not purport to *define* the offense as grand theft, thus section 490.2 does not apply. (*Johnston, supra*, 247 Cal.App.4th at p. 258.) Moreover, section 490.2 does not apply to statutes that do not *necessarily* involve theft and, while the offense may in shorthand be called “vehicle theft,” defendants may be convicted of the offense *whether or not* there was an intent to steal as long as the *taking or driving* was unauthorized. (*Johnston*, at p. 258; accord, *Acosta, supra*, 242 Cal.App.4th at p. 526.)

Defendant’s argument regarding section 666’s reference to the offense as auto theft stands the inference to be drawn from the language on its head. In context, section 666 excludes certain convictions for petty theft with a prior from misdemeanor treatment, to this end listing unauthorized taking/driving *separately* from either grand or petty theft in the list of qualifying theft priors. This would be surplusage if the references to theft in section 490.2 (or § 487) are to be construed as *including* the Vehicle Code offense, which is a result to be avoided in interpreting statutes. (*Johnston, supra*, 247 Cal.App.4th at p. 256.)

As for the argument premised on the status of unauthorized taking/driving as a lesser included offense of grand theft auto, this presupposes that a lesser offense is always less serious than the greater offense and thus warrants equal or lesser punishment. A lesser included offense is not necessarily less serious; it simply has fewer statutory elements. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 839 (*Wilkinson*) [greater/lesser relationship between different forms of battery does not establish ranking of severity of offenses such that punishing the lesser more severely is irrational].) Therefore, this

section 459” (§ 459.5, subd. (a)), and thus prior felony convictions under section 459 for second degree commercial burglary that would now be misdemeanor shoplifting qualify for relief under section 1170.18 even though section 459 is not itself included as an eligible offense. (*Johnston, supra*, 247 Cal.App.4th at p. 257, fn. 5.)

argument does not provide any basis for including unauthorized taking/driving as a theft within the meaning of sections 490.2 and 487.

“Defendant thus resorts to the usually unprofitable claim that this dichotomy in punishment results in a violation of his constitutional right to equal protection under the law. ‘[N]either the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor’s discretion in charging under one statute and not the other, violates equal protection principles.’ ([*Wilkinson, supra*,] 33 Cal.4th [at p. 838].) Specifically, the disparity between the former punishment for ‘grand theft auto’ and unlawful taking or driving is not a basis for finding a violation. (See *People v. Romo* (1975) 14 Cal.3d 189, 197.)” (*Johnston, supra*, 247 Cal.App.4th at pp. 258-259.) As we then noted, the difference in treatment ultimately is rational in any event: The drafters could permissibly elect to act in an incremental way, gauging the effects of the proposition’s sea change in penal law. In light of the small number of functioning vehicles worth less than \$950 at present values, it would not have been considered an injustice to fail to include them. In addition, the drafters could have decided to determine later whether prosecutors were exercising discretion to charge unlawful taking/driving of vehicles worth less than \$950 only as misdemeanors—an action the present prosecutor apparently eschewed in light of the lengthy record of defendant, including prior convictions for the same offense. (*Johnston*, at p. 259; accord, *Acosta, supra*, 242 Cal.App.4th at pp. 527-528.)

In short, defendant fails to present a sound basis for this court to rewrite the proposition to include unauthorized taking or driving of a vehicle. We therefore reject the claim.

2.2 *Section 496d: Receiving a Stolen Vehicle*

Confronted again with the express exclusion of certain items in an associated series, which ordinarily would lead to the conclusion that they are not to be included

(*Johnston, supra*, 247 Cal.App.4th at pp. 257-258), defendant contends in essence that by virtue of the general language of section 496, which applies to knowing receipt (or numerous other actions) of “any property that has been stolen” (§ 496, subd. (a)), the provisions of section 496 for misdemeanor sentencing apply as a matter of law to the more specific section 496d as well (and presumably sections 496a to 496c and 496e in addition). He alludes to the fact that section 490.2 does not identify every theft statute to which it applies, and suggests that section 496 operates in the same manner.

The flaw in defendant’s analogy to section 490.2 is the introductory language in the statute: “Notwithstanding Section 487 or any other provision of law defining grand theft” (§ 490.2, subd. (a).) Section 496 does not include any similar language indicating that its provisions are to apply to the entire subject of knowing receipt of stolen property. That the drafters of the proposition did not include a similar sweeping phrase in section 496 while placing one in section 490.2 is a strong signal that section 496 is not to operate in the same fashion.

Defendant does not otherwise provide any authority for construing the terms of a general statute as controlling a more specific statute. Indeed, his argument is at odds with the interpretive maxim. A specific statute controls over a general conflicting statute even where the latter is the one later enacted. (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 960-961.) Therefore, the misdemeanor treatment of violations of section 496 with respect to stolen property generally cannot be applied to section 496d or any of the other offenses in that series that apply to particular types of property.

Defendant again falls back on equal protection, contending there is an absence of any rational basis to treat a car thief under section 490.2 (and the statutes to which it applies) more leniently than a receiver of a stolen car. As we have stated above, the disparity of punishment under different statutes does not present a cognizable claim of equal protection. (*Johnston, supra*, 247 Cal.App.4th at pp. 258-259.) The difference in

treatment ultimately is rational in any event. The provisions of the section “496 series” of the Penal Code “are directed principally at activities of others than the thief” (*People v. Tatum* (1962) 209 Cal.App.2d 179, 183-184),⁷ and reflect an intent to cut off the market in stolen goods on which criminal enterprises thrive. “They make clear that in the eyes of the law the ‘fence’ is more dangerous and detrimental to society than is the thief . . . and draws the heavier maximum penalty.” (*Tatum*, at p. 184; accord, *People v. Adams* (1974) 43 Cal.App.3d 697, 709 [punishment constitutionally proportionate.]) Even a stolen car of low value can fuel a profitable illicit dismantling operation (the whole in this instance being less than the sum of its parts), and thus the receipt is more serious than the theft. As for the decision to treat section 496d violations differently than receiving stolen property under section 496, it is plausible that the drafters believed harsher treatment was warranted because there are people who depend on this type of property for essential transportation. As a result, we reject defendant’s claim that his right to equal protection of the law is violated.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

HULL, Acting P. J.

MAURO, J.

⁷ The provisions of the section 496 series also provide a fallback in situations where it is impossible to prove a defendant is the thief beyond a reasonable doubt.